Supreme Court, U.S.
FILED
AUG 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

(26)

No. 89-1215

IN THE

Supreme Court of The United States

October Term, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,

Petitioners,

v.

JOHNSON CONTROLS, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

*STANLEY S. JASPAN
SUSAN R. MAISA
ANITA M. SORENSEN
FOLEY & LARDNER
777 East Wisconsin Ave.
Milwaukee, WI 53202
(414) 271-2400

CHARLES G. CURTIS, JR.
FOLEY & LARDNER
One South Pinckney St.
Madison, WI 53701
(608) 257-5035

*Counsel of Record

JOHN P. KENNEDY
Vice President, Secretary,
and General Counsel
JOHNSON CONTROLS, INC.
5757 North Green Bay Ave.
Milwaukee, WI 53209

August 3, 1990

Attorneys for Respondent

BEST AVAILABLE COPY

SUPPLEMENTAL BRIEF FOR RESPONDENT

Johnson Controls respectfully calls to this Court's attention the decision and opinion of the United States Court of Appeals for the Sixth Circuit in *Grant* v. *General Motors Corp.*, ____ F.2d ____ (CA6 No. 89-3478, July 20, 1990). (Copies of the *Grant* slip opinion are being lodged with the Clerk's Office.) *Grant* was decided and filed one day after Johnson Controls' responsive brief was filed with this Court and therefore is a "late authorit[y] . . . that was not available in time to have been included" in Johnson Controls' earlier brief. See this Court's Rule 25.5.[1]

ARGUMENT

THE DECISION IN *GRANT* FURTHER UNDERMINES THE UAW'S ABSOLUTIST POSITION

With the decision in *Grant,* four courts of appeals, as well as the EEOC, have now rejected the UAW's position that Title VII categorically prohibits *all* fetal protection measures that distinguish among employees on the basis of their sex. See Brief for Respondent 16 n.23. Consistent with the other courts, the Sixth Circuit in *Grant* emphasizes that the inquiry under Title VII must "take[ ] into account the interests of all parties affected by fetal protection policies"—including unborn children—and that an employer does not violate the statute where it "establish[es] a factual basis for believing that its exclusionary policy is a necessary precondition to a safe and efficient workplace." Slip op., at 15.

Although the Sixth Circuit becomes the first court of appeals to reject the availability of a business necessity defense for gender-drawn fetal protection policies, see *id.*, at 14,[2] its opinion underscores the availability of the statutory BFOQ defense where an employer can show that such a policy is " 'reasonably necessary to the normal operation of [its] particular business or enterprise.' " *Ibid.* (quoting Title VII § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1)). Indeed, *Grant* points to the Seventh Circuit's *en banc*

[1]Johnson Controls' Rule 29.1 List and List of Parties are set forth in its July 19, 1990 Brief for Respondent.

[2]Compare the cases cited in Brief for Respondent 16 n.23.

majority opinion in the case at bar as "provid[ing] provocative insight into why the *Wright* court was incorrect in assuming that an employer necessarily would lose if forced to defend a fetal protection policy as a BFOQ." Slip op., at 12-13 (citing *Wright* v. *Olin Corp.*, 697 F.2d 1172 (CA4 1982)). Finally, the decision in *Grant* effectively rejects the UAW's suggestion in this case that the Pregnancy Discrimination Act somehow narrowed the contours of Title VII's BFOQ standard for classifications based on "pregnancy, childbirth, or related medical conditions." Title VII § 701(k), 42 U.S.C. § 2000e(k).[3]

Grant adopts a definition of the BFOQ standard based on Judge Cudahy's separate dissent below in this case, which in turn derives from *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (CA5 1969): "the employer must demonstrate 'a factual basis for believing that all or substantially all [excluded] women would be unable to perform safely [i.e., without inordinate risk to third parties, including fetuses] and efficiently the duties of the job involved.' " Slip op., at 15 (quoting Pet. App. 60a n.1 (Cudahy, J.)). That definition only partially captures the scope of the BFOQ standard.[4] As previously shown, under this Court's precedents an employer also can establish a BFOQ where, as here, "it is 'impossible or highly impractical' to assess the safety risks on an individualized basis, *i.e.* to determine 'with

[3]The Sixth Circuit reviewed the legislative history and relevant precedents and concluded that "the PDA transforms distinctions based on pregnancy or potential pregnancy into overt sex discrimination violative of Title VII *absent a showing that pregnancy or potential pregnancy is a bona fide occupational qualification*." Slip op., at 8 (emphasis added). The opinion nowhere suggests that the PDA narrowed the BFOQ standard for evaluating such distinctions; to the contrary, it cites to non-PDA Title VII precedents as setting forth the relevant definition of the BFOQ in this context. *Id.*, at 14-16. Compare UAW Br. 31-33, 38-40.

[4]It is, however, consistent with precedents emphasizing that the BFOQ standard is not one of absolute certainty, but instead whether an employer has " 'reasonable cause to believe,' " also described as a "substantial basis for believing," that its challenged practice is necessary. *Dothard* v. *Rawlinson*, 433 U.S. 321, 333 (1977) (quoting *Weeks*, *supra*, at 235); *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 422-423 (1985). See generally Brief for Respondent 38-40 & n.51.

sufficient reliability' which members of the group will risk damage to offspring if they remain in high-risk positions." Brief for Respondent 37 (quoting *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 414-415 (1985), and *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (CA5 1976) (internal quote to district court opinion omitted)). See also *Tamiami*, *supra*, at 235; U.S. and EEOC *Amici* Br. 22 & n.20.[5]

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

*STANLEY S. JASPAN
SUSAN R. MAISA
ANITA M. SORENSEN
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400

JOHN P. KENNEDY
Vice President, Secretary,
and General Counsel
JOHNSON CONTROLS, INC.
5757 North Green Bay Ave.
Milwaukee, Wisconsin 53209

CHARLES G. CURTIS, JR.
FOLEY & LARDNER
One South Pinckney Street
Madison, Wisconsin 53701
(608) 257-5035

*Counsel of Record

Attorneys for Respondent

August 3, 1990

[5]We also note a factual distinction between the policy described in *Grant* and the one at issue here. Whereas the plaintiff in *Grant* was reassigned to a lower paying job pursuant to the fetal protection policy involved in that case, employees transferred under Johnson Controls' policy receive indefinite medical removal protection benefits to ensure they suffer no losses in pay, benefits, or seniority. Compare slip op., at 2, 11 n.14, 16-17, with Brief for Respondent 9-10 & n.14.